UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

LYDIA GONZALEZ,

Plaintiff,

v.

EL DIA, INC., MARIA LUISA FERRE RANGEL; JORGE MERCADO; ABC INSURANCE COMPANY,

Defendants.

Civil No. 98-1965 (JAF)

OPINION AND ORDER

Plaintiff, Lydia González, brings this action against Defendant, El Día, Inc., for employment discrimination pursuant to the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990) ("ADA"); the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1988) ("ADEA"); the Puerto Rico Discharge Indemnity Law, 29 L.P.R.A. §§ 185a-185m (1995) ("Law 80"); Puerto Rico Law No. 44, 1 L.P.R.A. § 501 (1990) ("Law 44"); and Puerto Rico Law No. 100, 29 L.P.R.A. §§ 146-151 (1972) (amended 1990) ("Law 100"). Docket Document No. 1. Defendant El Día, Inc., moves for summary judgment. Docket Document No. 32.

Morales
Matos,
González
Manzano
8/31/01
by mail

I.

Factual and Procedural Synopsis

Plaintiff was born on March 7, 1933. Docket Document No. 32, Exh. 1. Plaintiff began working for EL NUEVO DÍA, a newspaper of general circulation in Puerto Rico, as a reporter in August 1991. Docket Document No. 32.

On April 22, 1997, Plaintiff slipped and fell in front of the entrance to the newspaper. Id. at Exh. 1. She reported the accident to the State Insurance Fund ("SIF"), which ordered her to rest. Docket Document No. 32. At the time of her accident, Plaintiff did not have any accrued sick leave. Id. To ease Plaintiff's financial burdens during her absence from work, EL NUEVO DÍA granted her several special advances. Id.

On or around June 12, 1997, Plaintiff met with María Luisa Ferré-Rangel ("Ferré"), Co-Director of the newspaper. Id. The two discussed Plaintiff's financial problems, as well as her possible retirement. Id.; Docket Document No. 34, Exh. 9. Plaintiff and Ferré offer different versions of the conversation.

According to Ferré, Plaintiff had previously asked her about her options for retirement, and Ferré responded to Plaintiff's inquiry by informing her of the benefits Plaintiff might receive as part of a retirement package. Docket Document No. 51, Exh. C. Ferré claims

that Plaintiff decided to retire and requested a $6,000 advance on her retirement package. Docket Document No. 34, Exh. 9; Docket Document No. 51, Exh. C. Plaintiff needed the money because she had not paid three months' worth of rent and her apartment was about to be repossessed. Id.

According to Plaintiff, she had decided not to retire, and Ferré opposed her decision to continue working. Docket Document No. 51, Exh. A. Plaintiff maintains that Ferré encouraged her to retire and collect retirement benefits. Id.

The following day, Ferré authorized the issuance of a $6,000 check for Plaintiff as an advance on her retirement package. Docket Document No. 32. Plaintiff received and cashed the check. Id.

On June 16, 1997, Plaintiff met with Jorge Mercado-Ruiz ("Mercado"), Vice-President of Human Resources for EL NUEVO DÍA. Id. Mercado gave Plaintiff a draft of a resignation agreement and retirement package, along with a draft of a contract for professional services for Plaintiff to continue writing articles for the newspaper as a collaborator. Id.

Two days later, Plaintiff met with Mercado a second time and notified him that she had rejected the resignation agreement and retirement package. Id. Plaintiff told Mercado that she wished to return to work. Id. Mercado accepted Plaintiff's decision and

informed her that she was welcome to return to her job with the newspaper. Id. at Exh. 4.

On June 19, 1997, Plaintiff reported for work. Docket Document No. 32. Mercado reminded Plaintiff that she owed $6,000 to the newspaper, and that she was expected to repay the debt. Id. Plaintiff signed an agreement promising to repay the loan by June 27, 1997. Docket Document No. 34, Exh. 18.

On June 27, 1997, the date her repayment was due, Plaintiff informed Mercado and union representatives that she did not have the funds to pay the $6,000 she owed to EL NUEVO DÍA. Docket Document No. 32. Instead of cash, Plaintiff offered some paintings and other artwork that she owned to satisfy her debt. Id. Defendant refused to accept the goods in lieu of cash. Id.

Since Plaintiff had failed to pay back the money she owed, Mercado felt that Plaintiff had betrayed his trust in her. Id. at Exh. 4. Mercado then suspended Plaintiff from employment until she paid the $6,000 debt. Id. During her suspension, Plaintiff did not receive a salary from Defendant. Id. Plaintiff remained on the payroll of EL NUEVO DÍA and received health care and life insurance benefits. Id.

Plaintiff filed a grievance in accordance with the collective bargaining agreement ("CBA") that existed between Defendant and the

United Steelworkers of America, a union of which Plaintiff was a member. Docket Document No. 32. On July 11, 1997, Plaintiff participated in a grievance hearing held between Defendant and the union. Id. At the hearing, Plaintiff testified that she was working for THE SAN JUAN STAR, a newspaper of general circulation which competes with EL NUEVO DÍA in Puerto Rico. Id. Plaintiff had begun working for THE SAN JUAN STAR on July 7, 1997. Docket Document No. 34, Exh. 20.

On July 15, 1997, Mercado terminated Plaintiff's employment with Defendant, allegedly because Plaintiff's employment with THE SAN JUAN STAR violated Defendant's rule against conflicts of interest. Docket Document No. 32. The CBA between Defendant and the United Steelworkers of America barred Defendant's employees, including Plaintiff, from working for its competitors. Id.

An administrative action was later initiated, challenging Defendant's termination of Plaintiff's employment. Docket Document No. 34, Exh. 21. Plaintiff requested that the union cease to represent her in her case against Defendant, Id. at Exh. 22, and Plaintiff's case was closed with prejudice. Id. at Exh. 24.

On August 26, 1998, Plaintiff filed the present complaint. Docket Document No. 1. In addition to Defendant El Día, Inc., Plaintiff named Ferré, Mercado, and an unnamed insurance company as defendants. Id. In their answer, Defendants included a counter-claim

for the $6,000 owed by Plaintiff to Defendant El Día, Inc. Docket Document No. 2. On June 25, 1999, this court dismissed Plaintiff's claims against Defendants Ferré and Mercado on the ground that they cannot be sued in their personal capacities under the ADA, the ADEA, and the associated state laws Plaintiff had invoked in her complaint. Docket Document No. 19.

On December 19, 2000, Defendant EL NUEVO DÍA filed its motion for summary judgment. Docket Document No. 32. Plaintiff opposes Defendant's summary judgment motion, Docket Document No. 39, and Defendant has filed a reply, Docket Document No. 41.

II.

Summary Judgment Standard

The standard for summary judgment is straightforward and well-established. A district court should grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); see Lipsett v. Univ. of P.R., 864 F.2d 881, 894 (1st Cir. 1988). A factual dispute is "material" if it "might affect the outcome of the suit under the governing law," and "genuine" if the evidence is such that "a reasonable jury could return a verdict for

the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The burden of establishing the nonexistence of a genuine issue as to a material fact is on the moving party. See Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting). This burden has two components: (1) an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and (2) an ultimate burden of persuasion, which always remains on the moving party. See id. In other words, "[t]he party moving for summary judgment . . . bears the initial burden of demonstrating that there are no genuine issues of material fact for trial." Hinchey v. NYNEX Corp., 144 F.3d 134, 140 (1st Cir. 1998). This burden "may be discharged by 'showing' . . . that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325. After such a showing, the "burden shifts to the nonmoving party, with respect to each issue on which he has the burden of proof, to demonstrate that a trier of fact reasonably could find in his favor." DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997) (citing Celotex, 477 U.S. at 322-35).

Although the ultimate burden of persuasion remains on the moving party and the court should draw all reasonable inferences in favor of the nonmoving party, the nonmoving party will not defeat a properly

supported motion for summary judgment by merely underscoring the "existence of some alleged factual dispute between the parties"; the requirement is that there be a genuine issue of material fact. Anderson, 477 U.S. at 247-48; Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1116 (1st Cir. 1993). In addition, "[f]actual disputes that are irrelevant or unnecessary will not be counted." Anderson, 477 U.S. at 248. Under Rule 56(e) of the Federal Rules of Civil Procedure, the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); see also Anderson, 477 U.S. at 256. Summary judgment exists to "pierce the boilerplate of the pleadings," Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 794 (1st Cir. 1992) and to "determine whether a trial actually is necessary." Vega-Rodriguez v. P.R. Tel. Co., 110 F.3d 174, 178 (1st Cir. 1997).

III.

Analysis

A. Age Discrimination in Employment Act

Defendant moves for summary judgment on the ground that Plaintiff has not shown that Defendant's legitimate, non-discriminatory reason for terminating her employment was false or a mere pretext for discriminatory animus. Docket Document No. 32.

Plaintiff's claim of age discrimination is based on the following: (1) Ferré and Mercado allegedly made numerous discriminatory comments against older persons; and (2) Defendant allegedly assigned Plaintiff to cover different stories compared to the younger reporters. Id. at Exh. 1. The record also contains testimony from Iris Landrón, Plaintiff's former supervisor and former director of the "Por Dentro" department at EL NUEVO DÍA, that Defendant might have wanted to purge Plaintiff from the ranks because of her age. Docket Document No. 51, Exh. D.

Defendant maintains that the various comments made by Ferré and Mercado are not probative of age discrimination. Docket Document No. 32.

The ADEA provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." 29 U.S.C. § 623(a)(1).

To survive a summary judgment motion, a plaintiff must first establish a prima facie case of age discrimination. Vega v. Kodak Caribbean, Ltd., 3 F.3d 476, 479 (1st Cir. 1993). Since Defendant concedes, for purposes of this summary judgment motion, that

Plaintiff has made a prima facie case of age discrimination, we need not list the elements of a prima facie case here.

Once a plaintiff has established a prima facie case of age discrimination, a presumption that the employer unlawfully discriminated against the employee is created. Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981), and we begin the second stage of our analysis. The burden of production shifts to the defendant-employer to state some legitimate, nondiscriminatory reason for the employee's termination. Mesnick v. General Elec. Co., 950 F.2d 816, 823 (1st Cir. 1991). We note, however, that the burden of persuasion remains with the plaintiff-employee at all times. Lawrence v. Northrop Corp., 980 F.2d 66, 69 (1st Cir. 1992); Mesnick, 950 F.2d at 823. If the defendant sustains its burden of production, the presumption of unlawful age discrimination is dispelled. The plaintiff must then demonstrate that the employer's proffered reason for the adverse employment action was pretextual, and that the real motive behind the action was age discrimination. Lawrence, 980 F.2d at 69-70. The plaintiff must do more than cast doubt on the defendant's justification for the challenged action; there must be a sufficient showing that discriminatory animus motivated the employer's action. Mesnick, 950 F.2d at 824. Direct or indirect evidence of discriminatory motive may do, but "the evidence as a

whole . . . must be sufficient for a reasonable fact finder to infer that the employer's decision was motivated by age animus." Connell v. Bank of Boston, 924 F.2d 1169, 1172 n.3 (1st Cir. 1991). The plaintiff must pass this last hurdle to thwart a defendant's motion for summary judgment.

Defendant's proffered legitimate, non-discriminatory reason for terminating Plaintiff was her employment with a rival newspaper in violation of Defendant's rule against conflicts of interest. Docket Document No. 32. Mercado testified that Plaintiff's age was not a factor in his decision to terminate her employment. Id. at Exh. 4.

1. Alleged Discriminatory Comments

A plaintiff can establish that Defendant's stated reason for her termination was a pretext for discrimination by showing that a decision-maker made discriminatory comments. Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 55 (1st Cir. 2000). For these comments to constitute evidence of discrimination, rather than mere stray remarks, they must be: "'1) related [to the protected class of persons of which the plaintiff is a member]; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue.'" Delgado Graulau v. Pegasus

Communications of P.R., 130 F. Supp. 2d 320 (D.P.R. 2001) (quoting Krystek v. Univ. of S. Miss., 164 F.3d 251, 256 (5th Cir. 1999)).[1]

a. Statements by Ferré

In her deposition, Plaintiff testified that Ferré made numerous comments which allegedly evidenced age discrimination. Docket Document No. 32, Exh. 1. Ferré purportedly made the following statements to Plaintiff: (1) Ferré repeatedly asked Plaintiff what her age was; (2) Ferré commented that Plaintiff dressed in an old-fashioned manner; (3) Ferré informed Plaintiff that Ferré didn't like the way Plaintiff styled her hair; (4) Ferré told Plaintiff that she should move to Florida and live with her daughter and grandchildren; (5) Ferré suggested that Plaintiff "retire and do other things"; (6) Ferré commented that Plaintiff had "manías de vieja" ("old person's ways") because she used a heater and was always cold; and (7) Ferré repeatedly told Plaintiff, "Doña Lydia, I don't know what I'm going to do with you." Id.

Ferré was not involved in the decision to suspend Plaintiff and later terminate her employment with Defendant. Id. at Exh. 4. Since

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[1]Although both Delgado Graulau and Krystek involved Title VII, not ADEA claims, the Supreme Court has stated that "interpretation of Title VII . . . applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived in haec verba from Title VII.'" Olmstead v. Zimring, 527 U.S. 581, 617 n.1 (1999) (Thomas, J., dissenting) (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)).

Ferré did not have any authority over Plaintiff's termination, we find that the alleged statements made by her in reference to Plaintiff's age do not evidence that Defendant's stated, non-discriminatory reason for her dismissal was actually a pretext for age discrimination. See Delgado-Graulau, 130 F. Supp. 2d at 330.

b. Statements by Mercado

Plaintiff argues that age-related comments by Mercado also evidence discrimination on the basis of her age. Docket Document No. 32, Exh. 1. Mercado purportedly commented that Plaintiff had "manías de vieja." Id. Mercado allegedly told Plaintiff, "Are you still here? I thought you had been discharged or terminated a long time ago." Id. On another occasion, Mercado purportedly asked Plaintiff, "Mom, can I help you?" Id.

We find that the comments allegedly made by Mercado do not constitute evidence of age discrimination. Plaintiff has not proffered evidence showing that these remarks by Mercado were proximate in time to her July 15, 1997 dismissal, nor has she shown that these comments related to the adverse employment action at issue. See Delgado-Graulau, 130 F. Supp. 2d at 330. Consequently, we find that Mercado's purported statements are not probative of age discrimination.

2. Alleged Differential Job Assignments

Plaintiff claims that Defendant's assignment of certain types of stories to her evidenced age discrimination. Docket Document No. 32, Exh. 1. Plaintiff complains that she was never assigned to cover a fashion show, whilst her younger colleagues were given those coveted projects. Id. Instead of giving Plaintiff the fashion assignments she wanted, Defendant directed her to write stories about Puerto Rican folk culture, Puerto Rican artisans, the Taíno Indians, and Puerto Rican history. Id.

Differential treatment of younger and older employees may constitute circumstantial evidence of age discrimination. See Mesnick, 950 F.2d at 824. We find that Plaintiff's single complaint about her job assignments is too impuissant to be probative of age discrimination.

As a newspaper of general circulation, EL NUEVO DÍA employs multiple reporters to cover a wide range of topics. The newspaper is free to distribute job assignments in the manner that it chooses, so long as it does not discriminate against individuals on any prohibited basis or engage in any other unlawful conduct.

Here, there is no indication that Defendant did not assign Plaintiff to cover fashion shows because of her age. There are numerous legitimate reasons that Defendant could have had for

distributing assignments in the way that it did, and Plaintiff's contention that Defendant did not assign her to cover fashion shows due to her age is nothing more than conjecture.

3. Landrón's Testimony

According to Landrón, Plaintiff's former supervisor at EL NUEVO DÍA, Plaintiff was a talented reporter who contributed much to the newspaper. Docket Document No. 51, Exh. D. In late 1995 or in 1996, Ferré allegedly asked Landrón to suggest to Plaintiff that she take an early retirement. Id. Landrón inferred that Defendant wanted to terminate Plaintiff's employment with the newspaper, possibly because of Plaintiff's age. Id.

We first note that "an offer of early retirement is not, on its own, evidence of discriminatory animus." Baralt v. Nationwide Mut. Ins. Co., 251 F.3d 10, 16 n.7 (1st Cir. 2001). For an offer of early retirement to constitute evidence of age discrimination, "a plaintiff must show that the offer was nothing more than a charade, that is, a subterfuge disguising the employer's desire to purge plaintiff from the ranks because of his age." See Vega, 3 F.3d at 480.

At her deposition, Landrón testified to the following:

> DEPONENT: Well, I inferred that . . . well, that they wanted to get Doña Lydia out of the newspaper. Of course, that is obvious, right? Because an early retirement. And if . . . and it was because of the condition that she had

> told me and I inferred, and I am going to say it again, I inferred that it could be for age. I mean, it's an inference.
>
> ATTORNEY: And why do you infer that it could be due to her health condition or her age? And I am speaking in regard to your function as director and Doña Lydia's boss.
>
> DEPONENT: Well, I inferred that because in my opinion as the director, Doña Lydia was an excellent reporter . . . and a person who added a great deal to the functioning of the "Por Dentro" department.

Docket Document No. 51, Exh. D.

To defeat a motion for summary judgment, "the nonmovant must 'produce specific facts, in suitable evidentiary form,' sufficient to limn a trial worthy issue. Failure to do so allows the summary judgment engine to operate at full throttle." Lawton v. State Mut. Life Assurance Co. of Am., 101 F.3d 218, 223 (1st Cir. 1996). In deciding a motion for summary judgment, we do not consider evidence that would be excluded at trial. See Vázquez v. López-Rosario, 134 F.3d 28, 33 (1st Cir. 1998).

Rule 701 of the Federal Rules of Evidence provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

FED. R. EVID. 701. The testimony of lay witnesses is generally limited to matters within their personal knowledge. See United States v. Santos, 201 F.3d 953, 963 (7th Cir. 2000). In accordance with Rule 701, courts do not admit speculative inferences by lay witnesses. Id.; United States v. Marshall, 173 F.3d 1312, 1315 (11th Cir. 1999).

Here, Landrón offered her opinion that Defendant could have been seeking to terminate Plaintiff's employment on account of her age. Landrón had no personal knowledge as to whether Defendant actually harbored a discriminatory animus against Plaintiff due to her age. Speculative inferences by lay witnesses are not admissible into evidence in accordance with Rule 701. Consequently, we do not consider Landrón's testimony regarding Defendant's alleged age discrimination in deciding this summary judgment motion.

4. Conclusion

In sum, Plaintiff has not proffered sufficient evidence of a discriminatory animus to prevent summary disposition of her ADEA claim. "Optimistic conjecture, unbridled speculation, or hopeful surmise will not suffice." Vega, 3 F.3d at 479. Based on the record before us, no reasonable jury could find that Defendant terminated Plaintiff on account of her age. Accordingly, we grant Defendant's motion for summary judgment of Plaintiff's ADEA cause of action.

B. Americans with Disabilities Act

Defendant argues that it is entitled to summary judgment on Plaintiff's ADA claim since Plaintiff herself stated in her deposition that she did not believe that her alleged disability was related to her termination. Docket Document No. 32.

Plaintiff contends that (1) she is a qualified individual with a disability within the meaning of the ADA; (2) Defendant is an employer covered by the ADA; (3) Defendant knew of and did not reasonably accommodate Plaintiff's disability; and (4) Defendant's failure to accommodate Plaintiff's disability affected the terms, conditions, or privileges of her employment. Docket Document No. 39. Plaintiff alleges that she had a back impairment and requested an orthopedic chair. Id. Plaintiff complains that Defendant did not provide her with an orthopedic chair, hand rest, computer screen, adjusted desk, and a stand to accommodate her disability. Id.

The ADA prohibits employers from discriminating against disabled persons. Specifically, the ADA provides that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a). The ADA prohibits employers from discriminating against disabled persons by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A).

To invoke the protections of the ADA, a plaintiff must have a disability within the meaning of the statute. See Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 646 (1st Cir. 2000) (discriminatory discharge claim); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999) (failure-to-accommodate claim).

Defendant argues that Plaintiff has not proffered sufficient evidence to show that she is a qualified individual with a disability within the meaning of the ADA. Docket Document No. 41.

Plaintiff maintains that she is a qualified individual with a disability within the meaning of the statute. Docket Document No. 39. Plaintiff is apparently arguing that her orthopedic problems constitute a physical impairment which substantially limits her in the major life activity of working. See Docket Document No. 39, Exh. F.

The ADA defines disability as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2); see also Tardie v. Rehabilitation Hosp. of R.I., 168 F.3d 538, 541 (1st Cir. 1999).

1. Physical Impairment

A "physical impairment" is defined as: "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." 29 C.F.R. § 1630.2(h)(1) (2001); see also Quint v. A.E. Staley Mfg. Co., 172 F.3d 1, 9 (1st Cir. 1999).

The record evidences that Plaintiff has various ailments that might be characterized as orthopedic problems: knee and ankle traumas, chest trauma, costochondritis, a temporomandibular disorder, back problems, neck pain, and thoracic outlet syndrome.[2] See Docket

[2]The record also shows that Plaintiff suffers from diabetes mellitus and obesity. Docket Document No. 39, Exh. F. Since Plaintiff has not argued that she is disabled within the meaning of the ADA because she has these conditions, see Docket Document No. 39, we do not consider whether these ailments constitute physical impairments.

Document No. 34, Exhs. 1, 5, Docket Document No. 39, Exh. F, Docket Document No. 51, Exh. A.

Plaintiff's orthopedic problems constitute a physical impairment within the meaning of the ADA. See 28 C.F.R. § 35.104(1)(ii) (2001) ("physical impairment" includes orthopedic conditions).

2. Major Life Activity

This court finds that working is a major life activity. See 29 C.F.R. § 1630.2(i); see also Gelabert-Ladenheim v. Am. Airlines, Inc., 252 F.3d 54, 58 (1st Cir. 2001) (accepting arguendo that working is a major life activity).

3. "Substantially Limits"

Equal Employment Opportunity Commission ("EEOC") regulations provide guidance as to the meaning of the phrase "substantially limits."

> With respect to the major life activity of working . . . [t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2 (j)(3)(i). In determining whether an individual is substantially limited in a major life activity, courts should

consider the following factors: (1) "[t]he nature and severity of the impairment," (2) "[t]he duration or expected duration of the impairment," and (3) "the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." Id. § 1630.2(j)(2). In the specific context of deciding whether an individual is substantially limited in the major life activity of working, courts may consider the following additional factors:

> (A) The geographical area to which the individual has reasonable access;
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Id. § 1630.2(j)(3).

The record contains some evidence regarding the nature and severity of Plaintiff's impairment. At her deposition, Plaintiff claimed that she has back problems that prevent her from remaining

seated for long periods of time, and from lifting heavy objects. Docket Document No. 51, Exh. A. Plaintiff's back problems cause her to have difficulty walking. Id. Specifically, Plaintiff experiences pain and stiffness in her back, her legs become heavy, and it becomes difficult for her to maintain her balance. Id. Plaintiff experiences spasms in the cervical area, and she suffers from pain throughout her body, particularly in her neck, chest, and back. Id. According to Plaintiff's own testimony, none of these conditions, including her thoracic outlet syndrome, adversely affected her performance as a reporter at EL NUEVO DÍA.[3] Id.

Plaintiff has not proffered any evidence shedding light on "[t]he duration or expected duration of the impairment," or on "[t]he permanent or long term impact . . . of . . . the impairment." 29 C.F.R. § 1630.2(j)(2). The record does not contain evidence regarding the geographical area to which Plaintiff has reasonable access and the number and types of jobs Plaintiff is disqualified

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[3]We also note that on July 7, 1997, Plaintiff began working for EL NUEVO DÍA's rival newspaper, THE SAN JUAN STAR. Docket Document No. 34, Exh. 20. Presumably, Plaintiff's new job with THE SAN JUAN STAR involved similar duties as her former position with EL NUEVO DÍA. Plaintiff has not claimed that her orthopedic conditions have caused her any problems with her new job, nor has she asserted that THE SAN JUAN STAR provided her with any accommodations for her impairment. See Whitney v. Greenberg, Rosenblatt, Kull & Bitsoli, P.C., 258 F.3d 30 (1st Cir. 2001) (finding that a plaintiff cannot show that she is substantially limited in working where she can perform without accommodation a job that is similar to the position in which she alleged discrimination due to failure to accommodate).

from performing because of her impairment. See id. § 1630.2(j)(3)(ii).

Plaintiff has not shown that her orthopedic conditions substantially limit her in the major life activity of working. While Plaintiff's evidentiary burden is not particularly high, she must still proffer evidence showing the approximate number of positions Plaintiff is unable to fill due to her orthopedic problems. See Quint, 172 F.3d at 12 (An ADA plaintiff is required to adduce "'evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., 'few,' 'many,' 'most') from which an individual would be excluded because of an impairment.'") (internal citation omitted); see also EEOC v. Rockwell Int'l Corp., 243 F.3d 1012, 1017 (7th Cir. 2001). Plaintiff has failed to present testimony from a vocational expert, labor market statistics, or any other evidence showing that she is substantially limited in the major life activity of working. See Gelabert-Ladenheim, 252 F.3d at 60-61.

Plaintiff has proffered a statement by Dr. Carlos E. Náter, which is set forth in its entirety:

> The above named patient [Plaintiff] was under my medical care from 08/28/91 to 08/04/99 for the treatment of sever [sic] myofascial pain of the whole body and trunk. She was found to be suffering [from] diabetes mellitus, obesity and

> a temporomandibular disorder. She has required the intervention of multiple specialists[.] During and after 1995 her condition became aggravated in such a way that she became significantly restricted to work as compared to the average person in the working community and the condition, manner or duration under which she can work was significantly restricted.

Docket Document No. 39, Exh. F. The statement is dated April 24, 2001. Id.

The April 24, 2001 note by Dr. Náter does not redeem Plaintiff's case. See Docket Document No. 39, Exh. F. Dr. Náter stated in a conclusory fashion that Plaintiff became restricted in her ability to work as compared to the average person. Id. Dr. Náter failed to articulate in sufficient detail the particular factors underlying his conclusion, and he did not specify whether Plaintiff's diabetes mellitus, obesity, and/or temporomandibular disorder purportedly restrict her ability to work. No reasonable jury could find that Plaintiff was substantially limited in the major life activity of working based on an unsubstantiated, vague statement prepared by one of Plaintiff's prior physicians just one day before Plaintiff filed her opposition to Defendant's summary judgment motion. Moreover, Dr. Náter's conclusion is belied by Plaintiff's own testimony that her orthopedic conditions did not adversely affect her ability to perform her job as a reporter. See Docket Document No. 51, Exh. A.

In sum, this court finds that Plaintiff has not adduced sufficient evidence for a rational fact-finder to conclude that she has a disability within the meaning of the ADA. Consequently, we grant Defendant's motion for summary judgment of Plaintiff's ADA claims.

C. Law No. 44

Puerto Rico's Law 44 is modeled after the ADA. See Acevedo Lopez v. Police Dep't of P.R., 247 F.3d 26, 29 (1st Cir. 2001) ("[T]he Commonwealth prohibits employment discrimination on the basis of disability in a similar fashion as the ADA."); Berrios v. Bristol Myers Squibb, 51 F. Supp. 2d 61, 67 (D.P.R. 1999) ("[T]he Puerto Rico legislature, by amending Law 44 in late 1991, sought to accommodate local law with the Americans with Disabilities Act, its federal counterpart.").

Like the ADA, Law 44 prohibits discriminatory discharge of persons with disabilities.[4] See 1 L.P.R.A. § 505 (1999). Law 44, like

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[4]The statute provides, in part:

> Private or public institutions shall not practice, put into effect or use discriminatory employment procedures, methods, or practices against persons with any kind of physical, mental or sensory disability just for the sake of said handicap. This prohibition includes the recruitment, compensation, fringe benefits, reasonable accommodation and access facilities, seniority, participation in training programs, promotion or any other term, condition or

its federal counterpart, requires employers to provide reasonable accommodations for disabled persons.[5] See id.; see also 1 L.P.R.A. § 507a (1999).

Since Law 44 and the ADA are parallel statutes and Plaintiff's claims under both statutes arise from the same underlying facts, we dispose of Plaintiff's Law 44 claims in the same manner as her ADA claims. Hence, we grant Defendant's motion for summary judgment of Plaintiff's Law 44 claims of discriminatory discharge and failure to accommodate.

> privilege in the employment. . . .
> . . . [T]he following actions shall also be deemed to be discriminatory practices . . . :
> . . . .
> . . . [To] deny employment to a qualified person with physical, mental, or sensory limitations when this denial is based on the intention of not providing reasonable accommodations.

1 L.P.R.A. § 505.

[5]The statute stipulates, in part:

> [Employers] shall be bound to carry out reasonable accommodations in the workplace in order to ensure that qualified disabled persons will be allowed to work effectively and to the maximum of their productivity, except when the employer is able to prove that such reasonable accommodations would represent an extremely onerous burden for the enterprise in financial terms.

1 L.P.R.A. § 507a.

D. Law No. 80 and Law No. 100

Defendant seeks summary judgment of Plaintiff's Law 80 cause of action on the ground that Defendant had just cause for terminating her employment. Docket Document No. 32. Defendant also argues that Plaintiff waived her Law 80 claim by failing to submit the dispute to arbitration, as required pursuant to the CBA. Id. Defendant avers that summary judgment of Plaintiff's Law 100 claim is appropriate, since her termination was for just cause and there is no evidence of discrimination. Id.

Puerto Rico's wrongful termination statute provides that an employee discharged from his employment without just cause is entitled to indemnity from his former employer. 29 L.P.R.A. § 185a. In addition, Law 80 plays a role in the analysis of an anti-discrimination claim brought under Law 100.

Pursuant to Law 100, a private cause of action exists for any person discharged from his employment on the basis of age. 29 L.P.R.A. § 146. A Law 100 plaintiff may establish a prima facie case by: 1) demonstrating that she was actually or constructively discharged; and 2) alleging that the dismissal was discriminatory. Cardona Jimenez v. Bancomercio de P.R., 174 F.3d 36, 42 (1st Cir. 1999). The plaintiff benefits from two presumptions. Alvarez-Fonseca v. Pepsi Cola of P.R. Bottling Co., 152 F.3d 17, 28 (1st Cir. 1998).

Under Law 80, an employee's termination is presumed to be unjustified unless the employer can demonstrate good cause. Id. Pursuant to Law 100, if the employer cannot show good cause, the dismissal is presumed to have been discriminatory. Id.

If a plaintiff has proven by a preponderance of the evidence that she was actually or constructively discharged, Law 80 shifts the burden of proof onto the employer to demonstrate good cause for the termination. Id. Puerto Rico's wrongful discharge statute sets forth an illustrative list of good causes for discharging an employee. See 29 L.P.R.A. § 185b.

If the employer cannot demonstrate good cause for the discharge, the Law 100 presumption of discrimination is triggered. Alvarez-Fonseca, 152 F.3d at 28. The employer must then show, by a preponderance of the evidence, that the dismissal was not motivated by discriminatory animus. Id. (discussing Law 100).

If the employer can show good cause, the Law 100 presumption does not apply, and the plaintiff has the burden of proving the ultimate issue of discrimination, as in any other civil case. Id. The plaintiff must show that, notwithstanding the good cause put forth by the employer, the defendant nonetheless breached Law 100 by dismissing the plaintiff for discriminatory reasons instead of, or in addition to, the lawful reason given for the termination. Id. "The

Law 100 plaintiff is then in [the] same situation as an ADEA plaintiff after the defendant has articulated a legitimate, non-discriminatory reason for its actions." Id.

To establish a prima facie case under Law 100, a plaintiff need only demonstrate that she was discharged and allege that the dismissal was motivated by discriminatory animus. Cardona Jimenez, 174 F.3d at 42. It is undisputed that Defendant terminated Plaintiff's employment on July 15, 1997. Moreover, Plaintiff has alleged that her termination was motivated by unlawful age discrimination. Consequently, we find that Plaintiff has established a prima facie case under Puerto Rico's anti-discrimination statute.

If a plaintiff has demonstrated by a preponderance of the evidence that she was discharged from her employment, Law 80 shifts the burden of proof onto the employer. Alvarez-Fonseca, 152 F.3d at 28. The employer must put forth a good cause for the termination.

Here, Defendant has submitted evidence showing that Mercado dismissed Plaintiff because of her improper affiliation with a rival newspaper, in violation of Defendant's rule against conflicts of interest. According to Mercado's affidavit, "[o]n July 15, 1997, I terminated Mrs. Lydia González' employment because she was working for The San Juan Star, while on El Nuevo Día's payroll and receiving

benefits from El Nuevo Día, which was a breach of El Nuevo Día's rule against conflicts of interest." Docket Document No. 32, Exh. 4.

We find that Defendant has met its burden of showing that Plaintiff's dismissal was based on good cause.[6] Consequently, we grant Defendant's motion for summary judgment of Plaintiff's Law 80 claim.

Since Defendant has demonstrated good cause for Plaintiff's termination, Plaintiff has the burden of proving that Defendant discriminated against her because of her age to prevail on a Law 100 claim. As we explicated supra, in section III(A), Plaintiff has not proffered sufficient evidence for a rational fact-finder to conclude that Defendant harbored a discriminatory age animus against her. Therefore, we grant Defendant's motion for summary judgment of Plaintiff's Law 100 claim.

E. Defendant's Counterclaim

Defendant seeks summary judgment of its $6,000 counter-claim against Plaintiff. Docket Document No. 32.

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[6]The following reasons constitute good cause for terminating an employee: "[t]hat the worker indulges in a pattern of improper or disorderly conduct" or "[t]he employee's repeated violations of the reasonable rules and regulations established for the operation of the establishment, provided a written copy thereof has been opportunely furnished to the employee." See 29 L.P.R.A. § 185b(a); 185b(c).

A contract is binding from the time an individual consents to it.[7] 31 L.P.R.A. § 3375 (1991). "Obligations arising from contracts have legal force between the contracting parties, and must be fulfilled in accordance with their stipulations." 31 L.P.R.A. § 2994 (1991).

On June 13, 1999, Defendant issued a $6,000 check to Plaintiff as an advance on her retirement package. Docket Document No. 32. Plaintiff later decided not to accept Defendant's resignation agreement and retirement package. Id. Plaintiff signed an agreement promising to repay the debt by June 27, 1997. Id. It is undisputed that Plaintiff has not returned the $6,000 that was loaned to her by Defendant. Id.; Docket Document No. 39.

Plaintiff contracted with Defendant to return the money owed by June 27, 1997. Over four years have elapsed since the date set for repayment, and Plaintiff still has not paid the $6,000 owed. Plaintiff has not advanced any argument why the loan should not be repaid. Therefore, we grant summary judgment in favor of Defendant on its counterclaim.

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[7]The statute reads: "Contracts are perfected by mere consent, and from that time they are binding, not only with regard to the fulfilment of what has been expressly stipulated, but also with regard to all the consequences which, according to their character, are in accordance with good faith, use, and law." 31 L.P.R.A. § 3375.

IV.

Conclusion

In accordance with the foregoing, we **GRANT** Defendant's motion for summary judgment of Plaintiff's ADEA, ADA, Law 44, Law 80, and Law 100 claims, and Defendant's counterclaim. This Opinion and Order disposes of Docket Document Nos. 32, 39, and 41.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 30th day of August, 2000.

JOSE ANTONIO FUSTE
U. S. District Judge